These are the tentative rulings for civil law and motion matters set for Thursday, November 7, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, November 6, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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1. S-CV-0027932 Maria Montessori Charter Acad vs. Rocklin Un. School Dist

Maria Montessori Charter Academy Inc.'s (MMCA) Motion for Summary Judgment, or in the alternative, Summary Adjudication

Ruling on Request for Judicial Notice

MMCA's request for judicial notice is granted in its entirety.

Rulings on Objections

RUSD's objections nos. 3, 5, 8, and 24 are sustained. RUSD's objections nos. 1, 2, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 are overruled.

MMCA's objections are overruled in their entirety.

Ruling on Motion

A motion for summary judgment will be granted if "all the papers submitted show that there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law." (CCP§437c(c).) A party to the action may also move for summary adjudication if that party contends there is no merit to one or more of the causes of action. (CCP§437c(f)(1).) However, a motion for summary adjudication shall only be granted where it completely disposes of a cause of action. (*Ibid*.)

The trial court engages in a specific analysis when reviewing a motion for summary judgment. First, it must define the scope of the motion by looking to the

operative pleading. The pleadings serve as the "outer measure of materiality" for a motion for summary judgment in addition to determining the scope of the motion. (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258.) The pleadings identify the issues raised and the request for summary judgment and/or adjudication must address these issues.

Second, the moving party must meet its initial burden. A moving cross-defendant has the initial burden of showing that a cause of action has no merit or there is a complete defense to the cause of action. (CCP§437c(p)(2).) The trial court must view the supporting evidence, and inferences reasonably drawn from such evidence, in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 843.)

The final part of the analysis is reached if the moving party meets its initial burden. The burden then shifts to the cross-complainant to show that a triable issue of material fact exists as to the cause of action or a defense to the cause of action. (CCP§437c(p)(2).) With these standards established, the court turns to the substance of MMCA's motion.

Improper Framing of Motion

It is worth noting that MMCA structures its motion as challenging eight specific issues rather than addressing each of the five causes of action within the first amended cross-complaint (FACC). CCP§437c(f) is meant to stop such practices, instead requiring that summary adjudication completely dispose of an entire cause of action, affirmative defense, claim for damages, or issue of duty. (*Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 95-97; *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1853.) MMCA's improper framing of its motion, subverts the purposes of CCP§437c(f), which are to save the court time, reduce the cost of litigation, and reduce abuse of the summary judgment procedure. Despite the movant's neglect of its statutory obligation in this regard, the court shall attempt to address the substance of MMCA's motion, as best as the motion can be understood.

General Allegations in RUSD's FACC Regarding the Funding Advance Agreement

MMCA challenges each cause of action in the FACC. Rocklin Unified School District (RUSD) alleges the parties entered into a series of funding agreements. The first was the Funding Advance Agreement, which was executed on January 25, 2008. (FACC ¶14.) The second was a Funding Advance Note also executed on January 25, 2008. (Id. at ¶17.) The third was the Second Funding Advance Note executed on March 8, 2008. (Id. at ¶20.) The fourth was the Addendum No. 1 executed on March 20, 2008. (Id. at ¶18.) The fifth was Addendum No. 2 executed on June 18, 2008. (Id. at ¶22.) The final was the

Third Funding Advance Note executed on June 24, 2008. (Id. at ¶24.) The FACC refers to these collectively as the "Funding Advance Agreements". (Id. at ¶30.)

FACC's First Cause of Action for Breach of Contract

The first cause of action alleges a claim for breach of written contract. RUSD alleges "[t]he Funding Advance Agreements legally obligated MMCA to repay not only the principal, but also the agreed upon interest on that principal. Despite repeated demands from the District [RUSD], MMCA, in breach of the terms and conditions of the Funding Advance Agreements has failed and refused and continues to fail and refuse to pay interest on the principal." (Id. at ¶34.) RUSD further alleges that "[a]s a direct and proximate result of MMCA's breach of the Funding Advance Agreements, the District [RUSD] has been damaged in an amount in excess of $700,000.00 which is in excess of the jurisdictional minimum of this Court." (Id. at ¶35.) These allegations delimit the scope of the first cause of action.

To meet its initial burden as to the first cause of action, MMCA must show that the cause of action has no merit or there is a complete defense to it. (CCP§437c(p)(2).) A breach of contract action includes the existence of a contract between the parties, performance or excuse for nonperformance, breach, and resulting damages. (*San Mateo Union High School District v. County of San Mateo* (2013) 213 Cal.App.4th 418, 439-440; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) MMCA's first contention is that the first cause of action fails because it is based upon an unexecuted Addendum No. 3 and the Fourth Funding Advance Note. This assertion, however, ignores the language in the FACC. RUSD does not refer to an Addendum No. 3 or a Fourth Funding Advance Note in its FACC nor does it refer to these documents in its allegations under the first cause of action. To reiterate, the pleadings frame a summary judgment/summary adjudication motion. (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258.) Since this contention is beyond the scope of the FACC, it does not assist MMCA in meeting its initial burden and is not a viable basis to support summary adjudication.

MMCA's second assertion is that the Funding Advance Agreement and the Addendum Nos. 1 and 2, along with all three Funding Advance Notes, do not contain interest provisions after December 1, 2008, which invalidates the over $700,000 demanded by RUSD. Again, the FACC frames the scope of the motion. RUSD generally alleges that MMCA is to pay principal and interest based upon the Funding Advance Agreements but MMCA failed to make such payments resulting in $700,000 in damages. (FACC ¶¶34-35.) The FACC does not identify whether the accrual of interest is applicable only after December 1, 2008. Once again, MMCA's contentions do not sufficiently address the allegations in the FACC, which prevents it from meeting its initial burden.

Even if the court were to assume this properly addresses the breach of contract action, the evidence submitted to support MMCA's contention is insufficient to meet its initial burden. MMCA contends that "both parties' expert witnesses confirm there are no provisions for what was to occur in the event State funding has not arrived by the maturity date of the Funding Advance Notices." (MMCA SSUMF No. 30.) This "undisputed" fact refers to deposition excerpts for Jeffrey Small and Lori Raneri. These excerpts, however, are taken out of context. For example, Mr. Small testified at his deposition that "so I think that based on what was happening that the parties expected to pay interest beyond that day and they were just not able to arrive at a negotiated settlement because of notice of the freeze that the State Allocation Board approved in December of 2008." (King declaration, Exhibit B – Small deposition p. 77:5-10.) Ms. Raneri's letter reviewing interest in the Funding Advance Agreement also states "[i]t is not clear from the Funding Advance documents whether there was to be interest accruing on advances not repaid by December 1, 2008, with the exception of the first advance of $1,500,000." (King declaration, Exhibit C – Raneri deposition, Exhibit 301, p. 8.) Since the evidence does not sufficiently challenge an element of the breach of contract action to shift the burden of proof, this contention also fails to support summary adjudication of the first cause of action.

MMCA's third assertion is that the breach of contract action fails since the sole source of repayment contemplated by the parties was state funding. The single undisputed fact to support this assertion refers to the Funding Advance Agreement. (MMCA SSUMF No. 33.) A contract is interpreted to give effect to the intent of the parties at the time it was entered into and ascertained from the writing alone whenever possible. (Civil Code §§1636, 1639.) Where the contractual provision is unambiguous, the court is bound to give effect to the plain and ordinary meaning of the language used by the parties. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; Civil Code §§1636, 1638, 1644.) Paragraph 5 of the Funding Advance Agreement states "[t]he Facility is to be funding through a *combination* of *ACADEMY revenue and funds obtained from the State of California ('State Funding')*." [Emphasis added.] (FACC Exhibit A.) The Agreement goes on to state "[*r]egardless of when State Funds are ultimately received* from the State, the ACADEMY shall pay the DISTRICT a minimum of three months interest. *Regardless of whether State Funds are received by the DISTRICT and the ACADEMY*, the ACADEMY will repay the Funding Advance, along with Interest". [Emphasis added.] (Ibid.) This language is plain and clear. The parties contemplated that both state funds and MMCA's revenues would be used to fund the facility and MMCA was expected to repay the funding advance, along with interest, whether or not state funds were received. This contention fails to support summary adjudication of the breach of contract action.

The fourth contention made by MMCA is that the State funding freeze was unforeseeable and should be construed as stopping interest as of December 17, 2008, the date of the funding freeze, which eliminates RUSD's ability to

establish the over $700,000 it demands. It has already been stated, in relation to the second assertion, that RUSD's breach of contract action alleges MMCA's failure to pay principal and interest under the Funding Advance Agreements resulted in $700,000 in damages. (FACC ¶¶34-35.) The FACC, however, does not identify a time for the accrual of interest to sufficiently establish that MMCA's contention would invalidate the alleged $700,000 in damages.

A further review of MMCA's submitted evidence in support of the fourth contention still does not sufficiently eliminate an element of or provide a defense to the breach of contract cause of action so as to shift the burden of proof to RUSD. From the express terms of the agreement, the parties contemplated that both state funds and MMCA's revenues would be used to fund the facility and MMCA was expected to repay the funding advance, along with interest, whether or not state funds were received. (FACC Exhibit A.) MMCA's "undisputed" facts and evidence support that State funding was an important part of the agreement. (MMCA's SSUMF Nos. 13, 26.) This, however, does not sufficiently establish that the agreement between the parties should be interpreted as ceasing any interest accrual after the funding freeze. Nor does MMCA sufficiently establish that the $700,000 is not based upon contractual terms in the agreement as the deposition testimony of Mr. Small and Ms. Raneri both indicate that some interest accrual beyond the funding freeze date was contemplated by the parties. (King declaration, Exhibit B – Small deposition p. 77:5-10; Exhibit C – Raneri deposition, Exhibit 301, p. 8.) Thus, summary adjudication cannot be granted on this basis.

MMCA's fifth assertion suffers from the same deficiencies as seen in its fourth contention. It argues that the unforeseeable funding freeze should require reformation of the agreement to stop interest on a date consistent with the agreement of the parties. Putting aside the redundant deficiency that MMCA does not address the actual allegations in the FACC, the "undisputed" facts and evidence submitted by MMCA raise more triable issues than eliminating elements of, or providing a complete defense to, the breach of contract action. The court has already highlighted inconsistencies in the evidence presented by MMCA surrounding the allegations of "undisputed" facts MMCA asserts in its separate statement. These inconsistencies also extend to other "undisputed" facts submitted by MMCA. For example, MMCA states that "[b]oth parties expected that the State would be the sole source of repayment funding" (MMCA's SSUMF No. 23) and cites to Mr. Small's deposition testimony to support this "undisputed" fact. This, again, takes Mr. Small's testimony out of context since he addressed the issue in terms of risk in entering into the construction contract with MMCA, who did not have a track record and the problematic method of short-term loan financing that required continual renegotiation between the parties. (King declaration, Exhibit B – Small deposition pp. 93:14-95:13.) The same inconsistencies exist for "undisputed" fact no. 24 where MMCA states "MMCA had no independent ability to repay." Its also refers to Mr. Small's deposition testimony to support this "undisputed" fact but this mischaracterizes Mr. Small's

testimony as he testified that "I don't know that much about Maria Montessori. Don't know what their credit was like at the time. But from what little I do know, I would think that the *primary source* of repayment would have had to have been State funds and the District was willing to advance State proceeds even though it did not have them yet because they had confidence that the Charter School would eventually get the State funds." [Emphasis added.] (King declaration, Exhibit B – Small deposition pp. 135:3-10.) These consistent mischaracterizations fail to support MMCA's assertions or assist MMCA in meeting its burden for summary adjudication of the breach of contract cause of action.

The sixth contention is that MMCA's performance under the Funding Advance Agreements is excused pursuant to Civil Code §1511 since RUSD is an arm of the State and it cannot collect on the agreement when the funding freeze delayed repayment. MMCA is correct that school districts are state agencies for the local operation of the state school system. (*Board of Education v. Superior Court* (1979) 93 Cal.App.3d 578, 582.) The deficiency in this assertion again stems from the discrepancies in the "undisputed" facts and supporting evidence presented by MMCA. As previously stated, evidence submitted in support of "undisputed" facts nos. 23 and 24 is taken out of context and does not establish that State funding was the sole funding for the project or that MMCA had no independent ability to repay. Thus, MMCA has failed to meet its initial burden and summary adjudication cannot be granted on this basis.

The seventh contention is that the interest provision in the Funding Advance Agreements is void since interest payments rely upon the use of school facilities funds, which is not authorized under Education Code §17072.35. Once again, MMCA's "undisputed" facts and supporting evidence are insufficient to carry its initial burden. "Undisputed" fact no. 68 states "[i]t is clear from the uncontroverted evidence that both parties understood RUSD expected its profits on the Funding Advance Agreement, in the form of interest, to come from the state funding for the Project." To support this fact, MMCA cites to Larry Stark's comments at the January 16, 2008 RUSD board of trustee meeting and the deposition testimony of Barbara Kampmeinert. It should be noted that the deposition excerpts cited in MMCA's separate statement are not included in the supporting evidence. More importantly, the submitted evidence does not sufficiently establish that the Funding Advance Agreements relied upon State funding. The court cannot ignore the express terms of the agreement that contemplated both state funds and MMCA's revenues would be used to fund the facility and MMCA was expected to repay the funding advance, along with interest, whether or not state funds were received. (FACC Exhibit A.) MMCA's evidence provides conflicting inferences, which raise further questions regarding the scope and terms of the agreements. It does not sufficiently establish that the interest provision is void and subject to summary adjudication.

The eighth and final contention requests the court declare that MMCA does not owe RUSD $767,753.76, that the principal has been fully repaid, and

that RUSD cannot meet its burden that MMCA owes over $700,000.00. As the court has repeated throughout its discussion, a request for summary adjudication may only be granted if it completely disposes of a cause of action, affirmative defense, claim for damages, or issue of duty. (CCP§437c(f)(1).) A request for a "declaration" regarding damages does not comply with this requirement. Assuming the court interpreted this request as seeking summary adjudication as to the claim for damages, the proffered "undisputed" facts and evidence are not sufficient to meet MMCA's initial burden for the reasons previously outlined above. For all of the foregoing reasons, the motion is denied as to the first cause of action for breach of contract.

FACC's Second Cause of Action for Breach of the Covenant of Good Faith and Fair Dealing

The second cause of action is for breach of the covenant of good faith and fair dealing. The FACC alleges "[t]he Funding Advance Agreements entered into by and between the District and MMCA contain an implied covenant of good faith and fair dealing by which MMCA promised to act in a fair and reasonable manner in performance of the Funding Advance Agreements." (FACC ¶37.) It further alleges "MMCA breached the covenant of good faith and dealing by failing to act in a fair and reasonable manner in the performance of Funding Advance Agreements by failing and refusing and continuing to fail and refuse to pay the interest owed to the District pursuant to the Funding Advance Agreements." (Id. at ¶38.) RUSD then alleges that "[a]s a result of MMCA's violation of the implied covenant of good faith and fair dealing, the District has been damaged in an amount in excess of $700,000.00 which is in excess of the jurisdictional minimum of this Court." (Id. at ¶39.) This establishes the scope of the second cause of action.

To reiterate, MMCA has the initial burden of showing that the second cause of action has no merit or there is a complete defense to the cause of action. (CCP§437c(p)(2).) A breach of the covenant of good faith and fair dealing permits a recovery in contract. (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1054.) It requires the existence of a contractual relationship between the parties. (*Smith v. San Francisco* (1990) 225 Cal.App.3d 38, 49.) The covenant may be breached through objectively unreasonable conduct. (*Badie v. Bank of America* (1998) Cal.App.4th 779, 796.) In support of its request for summary adjudication as to the second cause of action, MMCA proffers the same issues previously discussed in reference to the breach of contract action. MMCA's motion fails for the same reasons set forth in the above discussion since the "undisputed" facts and evidence are identical those brought in support of the first cause of action.

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FACC's Third Cause of Action for Breach of Contract Implied in Law

RUSD's third cause of action alleges breach of a quasi-contract, alleging that MMCA's conduct "resulted in MMCA's unjust enrichment to the detriment of the District." (FACC ¶41.) RUSD goes on to allege that "[a]s a result of MMCA's breach of contract implied in law, the District has been damaged in an amount in excess of $700,000.00 which is in excess of the jurisdictional minimum of this Court." (Id. at ¶42.) A quasi-contract is based upon unjust enrichment. (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51.) It is an obligation created by law to restore the aggrieved party to it former position by returning the item or equivalent monetary amount. (*Ibid.*) MMCA asserts that the third cause of action is subject to summary adjudication based upon its excused performance and the void interest provision in the agreements. These assertions are identical to those raised in the breach of contract cause of action and fail for the same reasons.

FACC's Fourth Cause of Action for Breach of Contract Implied in Fact

The fourth cause of action alleges that MMCA's conduct "resulted in MMCA's unjust enrichment to the detriment of the District." (FACC ¶44.) It goes on to allege that "[a]s a result of MMCA's breach of contract implied in fact, the District has been damaged in an amount in excess of $700,000.00 which is in excess of the jurisdictional minimum of this Court." (Id. at ¶45.) "[T]he essential difference between an implied and an express contract is the mode of proof. [Citation.] That is, the terms of an express contract are stated in words, while those of an implied agreement are manifested by conduct. [Citation.]" (*Youngman v. Nevada Irr. Dist.* (1969) 70 Cal.2d 240, 246.) The basis for challenging the fourth cause of action mirrors those asserted as to the breach of contract action. Thus, the motion fails for same reasons set forth in the court's previous discussion.

FACC's Fifth Cause of Action for Quantum Meruit

RUSD's fifth and final cause of action is for quantum meruit. The FACC alleges "[t]he District advanced funds which directly benefitted MMCA. The funds were advanced at either the express or implied request of MMCA. MMCA accepted and retained the benefit of the funds advanced by the District." (FACC ¶44 under Fifth Cause of Action.) RUSD goes on to allege "[t]he aforementioned conduct of MMCA resulted in MMCA's unjust enrichment to the detriment of the District." (Id. at ¶45.) The FACC also alleges that "[a]s a result of MMCA's breach of contract implied in fact, the District has been damages in the amount in excess of $700,000.00 which is in excess of the jurisdictional minimum of this Court." (Id. at ¶46.) An action for quantum meruit involves the performance of service, work, or labor for a defendant, at the defendant's request, for which the defendant promised to pay the reasonable value. (*Haggerty v. Warner* (1953) 115 Cal.App.2d 468, 476.) As previously discussed, MMCA challenges the fifth cause of action mirrors the arguments made as to the first cause of action.

Therefore, the motion fails for the reasons set forth in the court's discussion as to the breach of contract action.

Disposition

`To reiterate, MMCA's motion for summary judgment, or in the alternative, summary adjudication is denied in its entirety. The culmination of improperly framed challenges to the causes of action, deficiencies in the separate statement, and the mischaracterization of evidence prevented MMCA from meeting its initial burden. The ultimate result from MMCA's proffered motion was to raise triable issues rather than eliminate the need for trial. Based upon foregoing, the motion fails and must be denied.

Rocklin Unified School District's Motion for Summary Adjudication of Issues

Ruling on Request for Judicial Notice

MMCA's request for judicial notice is granted in its entirety.

Rulings on Objections

MMCA's objections nos. 1 through 29 are overruled in their entirety.

RUSD's objections nos. 7 is sustained. RUSD's objections nos. 1-6 and 8-18 are overruled.

Ruling on Motion

A party to an action may move for summary adjudication if that party contends there is no merit to one or more of the causes of action or affirmative defenses. (CCP§437c(f)(1).) However, a motion for summary adjudication shall only be granted where it completely disposes of a cause of action. (*Ibid*.) The moving party has the initial burden to show there is no affirmative defense, which then shifts the burden to the opposing party to establish a triable issue of material fact. (CCP§437c(p).) The trial court must view the supporting evidence, and inferences reasonably drawn from such evidence, in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 843.)

Effect of the Government Tort Claims Act on Eighth, Ninth, Twentieth, Twenty-Second, and Twenty-Third Affirmative Defenses

RUSD's request for summary adjudication aimed at these five affirmative defenses asserts that MMCA's setoff defenses are barred since MMCA did not present a claim in compliance with the Government Claims Act. The argument is interesting and a novel one. To support this assertion, RUSD cites to a single case, *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, recognizing that

the California Supreme Court did not address the issue of whether the Government Claims Act applies to affirmative defenses. The parties have not cited, and this court could not locate, any case law supporting such a proposition.

The assertion, however, must still be viewed in the context of RUSD's initial burden for summary adjudication. In order to shift the burden to MMCA, RUSD must establish that the Government Claims Act applies to the setoff defenses. The presentation of a single case citation that does not stand for RUSD's proposition and the submission of "undisputed" facts that show MMCA did not submit a claim nor did RUSD waive the claim requirement (RUSD's SSUMF Nos. 14-17, 29, 30, 35-38) are insufficient to shift RUSD's initial burden and the court cannot grant summary adjudication on this basis.

Second Affirmative Defense

MMCA alleges in the second affirmative defense that "[o]nce the State froze funding, MMCA contacted several alternative sources in an attempt to secure funding. The only available potential sources was a Grant Anticipation Note [GAN] through the local county treasurer. To secure that funding, MMCA needed RUSD's cooperate and RUSD refused." (Verified Answer ¶121) and also alleges "[t]he Cross-Complaint, and each purported claim for relief alleged therein, is barred because if RUSD has sustained any damages as alleged therein, which MMCA Inc. expressly denies, it failed to mitigate said damages. Said failure directly and proximately caused harm to MMCA Inc., including but not limited to any interest, damages, or other relief now sought by RUSD." (Verified Answer ¶138.) RUSD asserts that summary adjudication should be granted since the doctrine of mitigation did not require it to borrow money at a lower rate for MMCA.

"Whenever a contract is breached, it is the duty of the offending party to take every reasonable step to prevent loss to himself and to minimize the damages he has suffered in order to avoid or reduce the loss to be suffered by the offending party. [Citations.]" (*Johnson v. Comptoir Franco Belge D'Exportation Des Tubes D'Acier* (1955) 135 Cal.App.2d 683, 689.) "[I]t is not the duty of a party to a contract to assume the burden which the adverse wrongdoer has violated, nor to incur relatively large expenses on that account. [Citations.]" (*Dutra v. Cabral* (1947) 80 Cal.App.2d 114, 122.) RUSD submits sufficient evidence establishing that attempts to obtain a GAN were disproportionate to the damages from the breach to preclude the need for mitigation (RUSD's SSUMF Nos. 6-9) and shifts the burden to MMCA to establish a triable issue of material fact.

MMCA's supporting evidence is insufficient to establish a triable issue of material fact since it fails to show that RUSD had other reasonable options available to minimize the damages it suffered. Since MMCA has failed to present a triable issue, summary adjudication is proper as to the second affirmative defense.

Eighth Affirmative Defense

In the eighth affirmative defense, MMCA alleges that RUSD was its fiduciary "with respect to the Project as a result of the agency relationship between them and/or as a result of a joint venture or partnership created by the parties' conduct in the Project." (Verified Answer ¶151.) RUSD contends that summary adjudication should be granted for this affirmative defense since MMCA cannot establish an agency relationship, joint venture, or partnership between the parties. The court first looks to whether RUSD has sufficiently established that no agency relationship existed between the parties.

The creation of an agency relationship may be expressed or implied. (Civil Code §§2307; *Brand v. Mantor* (1935) 6 Cal.App.2d 126, 130; *Scholastic Book Clubs, Inc. v. State Board of Equalization* (1989) 207 Cal.App.3d 734.) The creation of an agency is determined by examining the relations of the parties as they exist under their agreement or actions. (*Trane Co. v. Gilbert* (1968) 267 Cal.App.2d 720.) "Indicia of an agency relationship are the agent's power to alter legal relations between the principal and others, a fiduciary relationship, and the principal's right to control the agent's conduct. [Citation.]" (*Valley Investment, L.P. v. BancAmerica Commercial Corp.* (2001) 88 Cal.App.4th 816, 826-827; *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 964-965.) The existence of an agency relationship is a question of fact. (*Thayer v. Pacific Electric Railway Company* (1961) 55 Cal.2d 430, 438.) "Only where the essential facts are not in conflict will an agency determination be made as a matter of law. [Citations.]" (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 965.)

To support its assertion that no agency relationship existed between the parties, RUSD submits the testimony of Brent Boothby, MMCA's Executive Director, who stated that RUSD and Larry Stark had complete control over the project. (RUSD's SSUMF Nos. 10, 11.) This establishes a sufficient showing that MMCA lacked an ability to alter any purported relations along with lacking an ability to control to shift the burden to MMCA on the issue of agency.

The next area to address is the existence of a joint venture relationship. "A joint venture is 'an undertaking by two or more persons jointly to carry out a single business enterprise for profit. [Citations.]" (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482.) Such a relationship exists where "there is 'an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an undertaking as to the sharing of profits and losses, and a right to joint control. [Citations.]" (*Connor v. Great Western Savings & Loan Association* (1968) 69 Cal.2d 850, 863.) As previously stated, RUSD submitted evidence establishing that it had complete control over the project. (RUSD's SSUMF Nos. 10, 11.) It submits further evidence that there was no agreement between MMCA and RUSD to share in the profits or losses for

the project. (RUSD's SSUMF No. 12.) Based upon this, a sufficient showing has been made to shift the burden as to the joint venture relationship.

The final matter addressed by RUSD is the existence of a partnership. A partnership generally is formed to conduct a series of transactions or carry out ongoing business. (*Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 365.) "The distinction between joint ventures and partnerships is not sharply drawn. A joint venture usually involves a single business transaction, whereas a partnership may involve 'a continuing business for an indefinite or fixed period of time.' [Citation.] Yet a joint venture may be of a longer duration and greater complexity than a partnership. From a legal standpoint, both relationships are virtually the same." (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482.) "An essential element of a partnership or joint venture is the right of joint participation in the management and control of the business. [Citation.] Absent such right, the mere fact that one party is to receive benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make him a partner or joint venture. [Citations.]" (*Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 365.) Since RUSD submits sufficient evidence establishing its complete control over the project and the lack of any profit/loss agreement between the parties (RUSD's SSUMF Nos. 10-12), it has shifted the burden to MMCA to show a triable issue of material fact.

In opposing the challenge to the eighth cause of action, MMCA disputes that RUSD and Mr. Stark has complete control of the project and asserting this creates a triable issue of material fact as to the existence of an agency relationship. MMCA is correct in this regard as it has submitted sufficient to raise a triable issue of material fact regarding RUSD's level of control over the project. (MMCA's SSUMF No. 11.) Since the eighth affirmative defense alleges a fiduciary relationship based upon an agency relationship, and MMCA has raised sufficient evidence to create a triable issue, the court cannot determine as a matter of law that an agency relationship does not exist to warrant summary adjudication.

Eighteenth Affirmative Defense

In reviewing this affirmative defense, it is important to reiterate the importance of the operative pleading. The pleadings serve as the "outer measure of materiality" for a motion for summary judgment in addition to determining the scope of the motion. (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258.) The pleadings identify the issues raised and the request for summary judgment and/or adjudication must address these issues. The eighteenth affirmative defense alleges "that each performance allegedly due to RUSD was excused, in whole or in part, by California Civil Code section 1511, including but not limited to the following: a. Because RUSD is an arm of the State and the State's imposition of the State Freeze delayed the ability to perform during the

State Freeze, any performance due during that period was excused while delayed by the State Freeze; b. Because performance was delayed and/or prevented by the actions of RUSD, Stark, and/or others under the management and control of RUSD, performance was excused during all such delays." (Verified Answer ¶176.) RUSD admittedly has only challenged the first portion of the eighteenth cause of action. This, however, is inappropriate since summary adjudication must completely dispose of a cause of action. (CCP§437c(f)(1).) The court is not persuaded by RUSD's assertions that summary adjudication may be made to a portion of the eighteenth affirmative defense. Thus, the motion is denied since RUSD has not met its initial burden.

Twenty-Second Affirmative Defense

MMCA alleges in the twenty-second affirmative defense that "MMCA Inc. alleges that the contracts and conduct of the parties in the Project created an agency relationship between RUSD and/or Stark and MMCA Public School/MMCA Inc., and a joint venture or partnership with RUSD in the Project, and gave rise to contractual obligations including a duty of good faith and fair dealing, a duty to diligently manage the Project using due care, and a duty to act in MMCA's best interests in the Project." (Verified Answer ¶185.) The analysis for affirmative defenses turns, in part, on the issue of whether there exists an agency, joint venture, and/or partnership. RUSD's request fails for the same reasons discussed as to the eighth cause of action.

Disposition

To reiterate, RUSD's motion for summary adjudication is granted in part. The motion is granted as to the second affirmative defense. The motion is denied as to the eighth, ninth, twentieth, twenty-second, and twenty-third affirmative defenses.

2. S-CV-0028920 Rocklin Park Place Condo Owners vs. D.R. Horton, Inc.

Cross-defendant's unopposed Motion for Determination of Good Faith Settlement is granted in its entirety. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling tortfeasors' proportionate shares of liability for plaintiffs' injuries and therefore is in good faith within the meaning of CCP§877.6.

Cross-defendant's request for telephonic appearance is granted. The party is informed that it must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

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3. S-CV-0029262 Karr, William G. vs. Leep, Inc. et.al.

Plaintiff's unopposed Motion to Strike the Answer is granted. A corporation cannot appear in an action *in propria persona* and may only appear through counsel. (*Merco Const. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 731.) Defendant's prior counsel was relieved on August 18, 2013. Since that time the defendant has taken no documented steps to retain new counsel. It has also failed to respond to the current motion. All of this, along with the impending trial date and lack of participation on the part of the defendant, warrant the court striking defendant's pleading. Defendant Leep, Inc.'s general denial, filed on August 31, 2012, is hereby stricken.

4. S-CV-0030126 Cappawana, George, et al vs. Centex Real Estate Corp., et al

Cross-defendant's unopposed Motion for Determination of Good Faith Settlement is granted in its entirety. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling tortfeasors' proportionate shares of liability for plaintiffs' injuries and therefore is in good faith within the meaning of CCP§877.6.

Cross-defendant's request for telephonic appearance is granted. The party is informed that it must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

5. S-CV-0030696 Eberly, Greg, et al vs. Lincoln Meadows Care Center, et al

Plaintiffs' Motion for Leave to File Fourth Amended Complaint

Plaintiffs' motion is granted subject to any and all dispositive motions, including demurrers and motions to strike, that may be brought by the defendants. The fourth amended complaint shall be filed and served on or before November 15, 2013.

The parties' requests for telephonic appearances are granted. The parties are informed that they must make arrangements for the telephonic appearances through CourtCall pursuant to Local Rule 20.8.A.2.

6. S-CV-0031148 Mazzoni, Nello, et al vs. Centex Real Estate Corp., et al

Cross-defendant's unopposed Motion for Determination of Good Faith Settlement is granted in its entirety. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling tortfeasors' proportionate shares of liability for plaintiffs' injuries and therefore is in good faith within the meaning of CCP§877.6.

Cross-defendant's request for telephonic appearance is granted. The party is informed that it must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

7. S-CV-0031558 Andrews, Frank P. Jr., et al vs. Perry, Gary G.

Plaintiffs' Motion for Leave to File First Amended Complaint is granted. The court has broad discretion in granting leave to amend a pleading and such discretion is usually exercised liberally to permit amendment to the pleading. (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.) Plaintiff's motion has been brought in a timely fashion, comports to the requirement of CRC Rule 3.1324, and in light of the recently granted trial continuance, there is no showing of prejudice to the defendant.

8. S-CV-0031724 Northern Calif. Coll. Service vs. Frumkin, Allan R.

The appearance of the parties is required on plaintiff's Motion for Spousal Support Withholding Order.

9. S-CV-0032112 MacMonagle, James, et al vs. Drees, Georgine

The motion to amend the pleading is dropped from the calendar as no moving papers were filed with the court.

10. S-CV-0032572 Storey, Rachel, et al vs. City of Roseville

Plaintiffs' *Pitchess* Motion is granted. In certain circumstances, a party may seek information contained in the personnel records of a peace officer. The parameters of such a request, often referred to as a *Pitchess* motion, is governed by Evidence Code sections 1043 through 1047. A party seeking disclosure of a peace officer's personnel records must strictly comply with the motion requirements outlined in the Evidence Code. (Evidence Code section 1043(c).) The moving party must make a good cause showing for the discovery sought and set forth the materiality of the records to the pending litigation. (Evidence Code section 1043(b)(3).) "Good cause" requires that the moving party demonstrate the relevance of the information through a specific factual scenario that establishes a plausible factual foundation for the allegations of misconduct. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85-86.) "[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1026.)

Plaintiffs seek disclosure of discrete documentary information within the personnel files of Sergeant Darren Kato and Officer William Clark. Upon reviewing the supporting declarations submitted by plaintiffs in the moving papers and the reply, a sufficient good cause showing has been made by plaintiffs. Since a sufficient showing has been established as to Sergeant Darren Kato and Officer William Clark, the appearance of the parties is required, including the appearance of the custodian of records, to conduct an *in camera* hearing of the personnel files of Sergeant Darren Kato and Officer William Clark.

11. S-CV-0032712 Bautista, Rochelle, et al vs. Sakic, Amir, et al

Defendant's unopposed Motion for Consolidation is granted. Placer Court Case Jackie Hill, et al. v. Terence Helmer, et al, SCV-33462, is consolidated with the current action. Bautista, et al. v. Sakic, et al, SCV-32712 shall be the lead case.

12. S-CV-0033048 Ruddel Corporation vs. Malone, Dave, et al

The demurrer is dropped from the calendar as a first amended complaint has been filed with the court.

13. S-CV-0033186 Duncan, Bruce vs. Nationstar Mortgage, LLC

Defendant Nationstar Mortgage LLC's Demurrer to the First Amended Complaint (FAC)

Ruling on Request for Judicial Notice

Defendant's request for judicial notice is granted.

Ruling on Demurrer

It is necessary to define the scope of the demurrer in light of plaintiff's opposition. Plaintiff has stated he will voluntarily dismiss the third cause of action for negligence per se and the fifth cause of action for violations under the Homeowner's Bill of Rights (HBOR). In light of this, the court sustains the demurrer as to the third cause of action and fifth cause of action without leave to amend. This leaves the first cause of action for fraud; second cause of action for negligent misrepresentation; and fourth cause of action for breach of written contract.

A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) Keeping these principles in mind, the court reviews the remaining causes of action.

A review of the first cause of action for fraud and the second cause of action for negligent misrepresentation shows that each is sufficiently pled to withstand demurrer. Defendant's demurrer to the first cause of action and second cause of action is overruled.

The same cannot be said for the fourth cause of action. A complaint must allege whether the contract is written, oral, or an implied contract. (CCP§430.10(g); *Otworth v. S. Pac. Transp. Co*. (1985) 166 Cal.App.3d 452, 458-459.) If the breach is based upon a written contract, then the terms must be stated verbatim in the complaint or by attaching a copy of the written instrument to the complaint. (*Id*. at p. 459.) The FAC alleges the

parties entered into a written contract and purports to attach a copy as Exhibit A. (FAC ¶46.) However, no such contract is attached. Since the terms are not recited in the FAC and no copy of the contract is attached, the fourth cause of action is insufficiently pled and the demurrer is sustained with leave to amend.

In summary, defendant's demurrer to the third cause of action for negligence per se and fifth cause of violations of the HOBR is sustained without leave to amend. The demurrer is overruled as to the first cause of action for fraud and the second cause of action for negligent misrepresentation. The demurrer is sustained with leave to amend as to the fourth cause of action for breach of written contract.

The second amended complaint shall be filed and served on or before November 22, 2013.

Defendant's request for telephonic appearance is granted. The party is informed that it must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

14. S-CV-0033258 Ziegler, Deborah, et al vs. Precision Craft, Inc., et al

Defendant's Motion to Dismiss, or Alternatively Stay Action for Forum Non Conveniens is granted. Defendant's request for judicial notice is granted. A mandatory forum selection clause is usually given effect unless it is unfair or unreasonable. (*Berg v. MTC Electronics Technologies* (1998) 61 Cal.App.4th 349, 358-359; *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 494-495.) The "forum selection clauses will be given effect unless the party assailing the clause establishes that its enforcement would be unreasonable, i.e., that the forum selected would be unavailable or unable to accomplish substantial justice. [Citation.]" (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 494-495.) Defendant has sufficiently shown the existence of the mandatory forum selection clause and plaintiffs have not submitted sufficient evidence of unreasonableness or unfairness. Nor has there been a sufficient showing of a strong public policy that requires the matter be heard in California. (*Hall v. Superior Court (Imperial Petroleum, Inc.)* (1983) 150 Cal.App.3d 411, 416-418.) Based upon the foregoing, the current action is stayed subject to severance or lifting of the stay for other parties in the action that are not subject to the forum selection clause. (*Cal-State Business Products & Systems, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1674.)

15. S-CV-0033328 Morin, Roland, et al vs. Alley and Co. Heating/Air, Inc., et

Plaintiffs' Motion for Preference and Trial Setting is dropped from the calendar as the court is informed that case has settled.

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16. S-CV-0033750 Sakamoto, Debbie, et al - In Re the Petition of

The Petition for Compromise of Minor's Claim is granted. If oral argument is requested, the appearance of the minor at the hearing is waived.

These are the tentative rulings for civil law and motion matters set for Thursday, November 7, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, November 6, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.